

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

STATE OF TENNESSEE v. JOSEPH DEJUAN WEBSTER

Appeal from the Criminal Court for Davidson County

No. 2005-B-1384 Steve R. Dozier, Judge

No. M2007-00050-CCA-R3-CD - Filed May 29, 2008

Appellant, Joseph Dejuan Webster, was convicted by a Davidson County jury of first degree premeditated murder. As a result, he was sentenced to life in prison. The trial court ordered the life sentence to be served consecutively to a prior sentence. In a motion for new trial, Appellant argued that new evidence was available to prove that his brother actually committed the crime, after a lengthy hearing, for which Appellant was convicted. The trial court denied the motion for new trial. We conclude that the evidence was available prior to Appellant's trial and Appellant has failed to show that he used reasonable diligence in seeking the newly discovered evidence. Accordingly, the trial court did not abuse its discretion in denying the motion for new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

F. Michie Gibson, Jr., Nashville, Tennessee, for the appellant Joseph DeJuan Webster.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In April of 2005, Appellant was indicted for the first degree murder of Leroy Owens that occurred on November 22, 1998. At trial, Tammy Nelson testified that she was living in an apartment complex at 159 Hermitage Avenue in November of 1998. She and Leroy Owens, the

victim, were friends. She knew the victim as “Little Nick,” and he would sometimes stay at her apartment. Ms. Nelson and the victim had used drugs together in the past.

According to Ms. Nelson, around the beginning of November, a man named Robert Nichols, who was known as “Big Nick,” wanted “some dope.” The victim offered to call his “cousin” who had some “good stuff.” Two men, one of whom was Appellant, arrived at Ms. Nelson’s apartment. The men claimed that the victim already owed them some money. The victim and “Big Nick” pooled their money together and “got the drugs” from the two men. The men left the apartment. Ms. Nelson was under the impression that the victim and “Big Nick” were going to divide the drugs up for resale to make some money, but “Big Nick scammed Little Nick out of his money.”

About three days later, Appellant and the other man that brought the drugs, returned to Ms. Nelson’s apartment, looking for the victim. Ms. Nelson specifically identified Appellant as one of the men that came to her door. The men came to her apartment five or six times looking for the victim. At some point, the two men gave Ms. Nelson a pager number and told her to call them when she saw the victim. On November 21, 1998, the victim came to her house. The victim and Ms. Nelson got high together, and the victim stayed the night at her apartment. Ms. Nelson called the pager number to let the men know that the victim was at her apartment. The two men arrived at Ms. Nelson’s apartment in a white station wagon on the morning of November 22, 1998. When they arrived, the victim was asleep. Ms. Nelson woke the victim up to tell him that Appellant and the other man were there to see him. Appellant went to the car where Ms. Nelson saw him put on gloves and get a stick. The other man “snatched” the victim out of the front door of Ms. Nelson’s apartment. Ms. Nelson saw Appellant start hitting the victim with his hands. The victim took off running, escaping over a fence. As he was running away, one of his black tennis shoes came off his foot. Appellant and the other man got into their car to chase the victim. About thirty minutes later, Ms. Nelson learned that the victim was dead.

The victim ran to Delunn Todd Hyde’s house. According to Mr. Hyde, the victim entered his house without being invited inside. The victim looked like he had been beaten up, was missing a shoe and had bruises under his eye. The victim’s pants were “halfway down.” The victim acted “scared” and asked to use Mr. Hyde’s telephone. Mr. Hyde did not want to get involved, so he escorted the victim out of his house. The victim asked Mr. Hyde to look outside to see if there was a white car. Mr. Hyde reported that he did not see a white car. At that point, the victim “took out across the street running.” Mr. Hyde then saw a white “souped up” station wagon coming over the hill toward the victim. The car “flew right behind” the victim. Mr. Hyde could tell that there were two black men in the car and remembered that he had seen the same car the night before on Lewis Street. About thirty minutes after the victim left his house, Mr. Hyde walked to the scene of the incident and learned that the victim was dead.

Fred McClain testified that on November 22, 1998, he was “doing some concrete” work for a small restaurant on the corner of Green Street and Wharf Avenue.¹ Around 11:30 a.m., Mr. McClain heard a car pull up and brakes “screeching.” The next thing he saw was a “man running.” The man running turned out to be the victim, Leroy Owens. He also saw a “white car that pulled up, that the two fellows jumped out of.” The two men were black and one of the men was about five feet nine inches tall and weighed about two hundred and twenty-five or two hundred and thirty pounds. The other man was smaller, “about five eight and weighed about one seventy-five.” The car was an older white station wagon with “chrome wheels.”

The two black men from the car “bum rushed” or “tackled” the victim while he was running. This caused the victim to actually bump into Mr. McClain, who hit his head on the food service window of the restaurant. Mr. McClain got up and ran around a corner to the side of the building. When he peered around the corner, he saw the larger of the two men standing over the victim, who was lying on the ground. The larger man was hitting the victim with a cinder block. Mr. McClain heard the man ask, “Where’s my goddamn money?” Mr. McClain saw the man hit the victim twice with the cinder block before the two men left in the station wagon. Once the two men left, Mr. McClain could see blood running out of the victim’s head where he had been hit with the block. The victim was silent and still. Mr. McClain was unable to identify the attackers.

Officer James Jordan of the Metropolitan Nashville Police Department responded to a call at 11:33 a.m. on November 22, 1998, reporting the beating of the victim. When he arrived on the scene, Officer Scott Baswell was already present. The victim was lying on the ground in a large pool of blood. The victim’s skull was exposed, and there was a large cinder block lying next to the body within a foot of the victim’s head.

Detective Brad Corcoran and Detective Pat Postiglione investigated the murder of the victim. Around 7:00 p.m. on the day of the murder, Detective Corcoran and Detective Postiglione went to 1245 Lewis Street and spoke with a woman named Katrina Norman. At the time, Ms. Norman was Appellant’s girlfriend. At the time of trial, she was married to Appellant and went by the name Katrina Webster.² Detective Corcoran informed Ms. Norman that he was trying to locate Appellant and the white station wagon that had been described by several witnesses. Ms. Norman told Detective Postiglione that she knew the owner and driver of the car but refused to identify them. Ms. Norman, who had Appellant’s first name, “Joseph,” tattooed on her neck, was uncooperative and actually became “very defensive” during questioning. At trial, Ms. Norman testified that she did not know anything about the victim’s murder. She also denied that she told the police she knew the owner and driver of the white station wagon.

¹ According to Mr. McClain, at the time of trial the name of Wharf Avenue had been changed to Charles E. Davis.

² For consistency, we will refer to her as Ms. Norman throughout the opinion.

Detective Postiglione was the first person to interview Ms. Nelson. She initially denied knowing the victim but later explained what occurred on the day of his murder. Ms. Nelson identified Appellant from a photographic lineup. She also identified Appellant at trial. According to Detective Postiglione, Ms. Nelson was “fearful,” “upset and crying.”

At trial, Dr. Feag Lindthp, an assistant medical examiner, testified that the victim sustained multiple blunt force injuries to the head that resulted in several abrasions and lacerations. The victim also had multiple skull fractures and hematoma. There was hemorrhaging of the brain stem, and the victim’s brain itself was bruised in several places. In Dr. Lindthp’s opinion, the victim’s death was caused by multiple blunt force injuries to the head.

Appellant took the stand in his own behalf. He claimed that he did not remember what he did on November 22, 1998. Appellant denied ever owning a white station wagon. Further, Appellant claimed that he did not know Tammy Nelson. Appellant stated that he was dating Ms. Norman at the time of the incident and that she lived on Lewis Street.

At the conclusion of the trial, the jury found Appellant guilty of first degree premeditated murder. The trial court sentenced Appellant to life in prison, to be served consecutively to the sentences Appellant was already serving for felony drug charges. Appellant filed a motion for new trial in which he argued that he had “obtained newly discovered evidence that was not available to counsel at the time of trial.” Attached to the motion were affidavits from Marie Burns, Appellant’s mother; Katrina Norman, Appellant’s wife; and Arthur Gordon, Appellant’s brother. The affidavits alleged that Appellant’s brother, Kenneth Neal, was the owner of the white station wagon and was the perpetrator who killed the victim. Appellant later filed an amended motion for new trial in which he raised additional grounds for relief.

The trial court held a hearing on the motion for new trial. At that hearing, several witnesses took the stand, including: Marie Burns, Appellant’s mother; Arthur Gordon, Appellant’s brother; Katrina Norman, Appellant’s wife; Kenneth Neal, Appellant’s brother; Phillip Cotton, a friend of Mr. Neal; and Appellant.

Marie Burns testified that her son Kenneth Neal was the owner of the white station wagon. Ms. Burns admitted that she was questioned in 1998 by Detective Postiglione about the white station wagon. She claimed that Detective Postiglione never asked if Appellant owned the white station wagon. She did not tell the detective that Mr. Neal was the owner of the car. Ms. Burns claimed that Appellant told her prior to being arrested for the victim’s murder that Mr. Neal “went out south and killed that man,” but that she never told anyone about it because Appellant told her he “didn’t want to see [her and Appellant’s wife] hurt.” According to Ms. Burns, she approached counsel for Appellant immediately after trial and told her that Mr. Neal killed the victim. In fact, Ms. Burns

claimed that Mr. Neal admitted to the murder.³ Ms. Burns stated that she had a conversation with Mr. Neal prior to Appellant's trial in which Mr. Neal told her that the jury would not convict Appellant of the crime because he and Appellant "don't look alike" and that he was the one that "did it." Ms. Burns was afraid to tell anyone, but thought that after Appellant was convicted, it was time to come forward with the information.

Arthur Gordon testified that his brother, Mr. Neal, told him that he committed the murder that Appellant was convicted of committing, but he could not remember when that conversation occurred. On cross-examination, Mr. Gordon stated that the conversation may have occurred about "three weeks" after the murder. Mr. Gordon also informed the court that Mr. Neal owned a white station wagon in 1998. Mr. Gordon testified that Mr. Neal told him that the car was taken to Kentucky and "destroyed."

Katrina Norman Webster testified at the hearing on the motion for new trial. She claimed that she knew that Mr. Neal committed the murder in 1998, but did not tell anyone about it because she was scared of Mr. Neal. She decided to come forward with the information after trial because her husband was convicted for a crime that he did not commit.

Kenneth Neal denied that he owned a white station wagon in 1998. He admitted that Ms. Burns questioned him about the murder but claimed that he walked out the door instead of talking to her about the murder. When asked why he did not specifically deny committing the murder, Mr. Neal responded, "I didn't have a reason to say anything about it."

At the conclusion of the hearing, the trial court took the matter under advisement. In a written order, the trial court denied the motion for new trial, determining:

The proof . . . showed that the defendant, his mother, his wife and his other brother all knew about the alleged confession *before* the trial. However, they all chose to not inform the defendant's lawyer about this potential piece of evidence. The timing of the entire family revelation causes the Court great concern about the legitimacy of the information. There has been no proof to indicate that the defendant attempted to procure Kenneth Neal's presence at trial and the Court finds the allegations raised at this late date unbelievable. Therefore, the defendant did not exercise reasonable diligence in searching for the evidence prior to trial as he knew about the evidence prior to trial and made no efforts to have Kenneth Neal available to testify at trial.

³There was an audiotape admitted into evidence at the hearing that allegedly contained a conversation between Mr. Neal and Ms. Burns in which Ms. Burns accused Mr. Neal of committing the crime. After listening to the audiotape, it appears to be of a conversation between Ms. Norman, referred to in the tape as "Trina," and Mr. Neal. During the discussion, from what we could understand, Ms. Norman expresses her frustration with Mr. Neal's lack of monetary assistance to support Appellant's defense. We could not locate a portion of the tape in which there was a conversation between Ms. Burns and Mr. Neal. The conversation between Ms. Norman and Mr. Neal appears to be followed by a tape recording of a lecture on Tennessee history and the Chickasaw Treaty.

This quite simply is not newly discovered evidence. Therefore, this issue is without merit.

Analysis

Appellant filed a timely notice of appeal and argues to this Court that the trial court improperly denied the motion for new trial. Specifically, Appellant argues that if the jury heard the testimony as presented at the motion for new trial hearing at trial, they would not have convicted Appellant of first degree murder. Appellant admits that the evidence was known “before the trial by the Appellant and his family,” but that the evidence was not “available” to Appellant’s counsel prior to trial. The State contends that the trial court properly denied the motion for new trial because Appellant knew about the alleged evidence prior to trial and chose not to present the evidence.

To receive a new trial on the ground of newly discovered evidence, a defendant must demonstrate: “(1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence;” and (3) the likelihood that the evidence would change the outcome of the trial. *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994) (citing *State v. Goswick*, 656 S.W.2d 355, 358-60 (Tenn. 1983)). Additionally, the decision regarding whether to grant or deny a motion for a new trial predicated on newly discovered evidence “rests in the sound discretion of the trial court.” *State v. Walker*, 910 S.W.2d 381, 395 (Tenn. 1995). Moreover, the trial court is authorized to ascertain the “credibility of newly discovered evidence for which the new trial is asked,” and the motion should be denied unless the court has assured itself that the testimony would be worthy of belief by the jury. *Id.* (quoting *Rosenthal v. State*, 292 S.W.2d 1, 5 (Tenn. 1956)).

In the case herein, Appellant sought a new trial on the basis he now has evidence that his brother actually committed the crime of which he was convicted at trial. Appellant presented evidence during the new trial hearing. The witnesses, including Appellant’s mother, wife, and brother, testified that they knew that Mr. Neal had allegedly committed the murder of the victim prior to Appellant’s trial, but had not informed Appellant’s counsel or the police about this information for various reasons. Ms. Burns’ testimony indicated Appellant himself knew Mr. Neal committed the murder. Mr. Neal denied committing the murder. When denying the motion for new trial on the basis of the newly discovered name and location of this witness, the trial court found that Appellant knew about the information prior to trial and that the testimony concerning this allegedly newly discovered evidence was not credible.

Again, the decision regarding whether to grant a new trial based on newly discovered evidence is left to the sound discretion of the trial court, and the trial court should deny a motion for new trial on the basis of new evidence unless it first determines that a jury would have believed this new evidence and used reasonable diligence in seeking the evidence. *Walker*, 910 S.W.2d at 395; *Nichols*, 877 S.W.2d at 737. Based on the foregoing reasons, we find that the trial court acted properly and within its discretion by denying Appellant’s motion. The record in this case amply supports the finding that Appellant’s witnesses at the new trial hearing were not credible. Moreover,

if they are to be believed at all, they and Appellant knew about this alleged evidence yet did not come forward. This clearly shows a lack of reasonable diligence.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE